UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOEL W. SWENSON,	)	
	)	
Plaintiff	)	
	)	
v.	)	**Civil No. 95-7-P-DMC**
	)	
SUNDAY RIVER SKIWAY CORPORATION,	)	
	)	
	)	
Defendant	)	

MEMORANDUM DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT[1]

The plaintiff in this negligence case seeks to recover damages resulting from a skiing accident that occurred at the Sunday River ski area operated by the defendant. Specifically, he alleges that the defendant negligently allowed a mogul field to form where it was invisible to approaching skiers and failed to warn of it. For the reasons discussed below, I grant the defendant's motion for summary judgment on both claims.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter

[1] Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz,* 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e); Local R. 19(b)(2).

II. Factual Context

Viewing the record in the light most favorable to the plaintiff, the following facts emerge. On March 24, 1993 the plaintiff was skiing at Sunday River. After skiing a number of expert trails, the plaintiff started down a trail called "3-D," which was marked with the traditional blue square symbol meaning "more difficult." The trail surface visible to the plaintiff was groomed corduroy smooth from edge to edge. He skied for some distance down the trail in a giant slalom style, which was appropriate for that portion of the trail.

Approaching the intersection of 3-D and another trail, the plaintiff saw a breakover[2] ahead. From the point where the breakover became visible, a skier could not see what was on the other side of it, including moguls[3] on the trail.

As the plaintiff approached the breakover, he started to slow down. Once the plaintiff crested the breakover, he saw a mogul field in front of him. Unable to avoid the moguls, he tried to ski through them but fell and was injured. Even an expert skier cannot be expected to ski the moguls that the plaintiff described at giant slalom speed.

The plaintiff was an expert skier, capable of skiing any terrain and all surface conditions. Had he been skiing slower, he could have negotiated the mogul field. He was aware that he might encounter a variety of obstacles in a blind spot behind a breakover, and that before reaching such a breakover one should slow down to be able to stop or maneuver around any obstacles.

The defendant designed 3-D to be an intermediate-level trail that would include moguls, providing intermediate level skiers with a diverse skiing experience and a variety of terrain that they otherwise might not encounter. To retain moguls once they are formed, the affected area of the trail is simply left ungroomed. The defendant chose 3-D for moguls because of its elevation and terrain, and because it was in a good location to hold clinics to teach intermediate skiers mogul skiing.

III. 26 M.R.S.A. § 488

The Maine legislature, "in recognition of the fact that part of the attraction of skiing is the

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[2] A breakover is the point of convergence between two slopes of differing degrees.

[3] Moguls are bumps in the snow surface of a ski trail that are created as skiers carve out their turns.

risk that is involved," has limited the liability of ski area operators. *Finnern v. Sunday River Skiway Corp.*, Civ. No. 91-0065-P-H, 1991 WL 487442, at *1 (D. Me. Nov. 5, 1991) ("*Finnern I*") (citing 26 M.R.S.A. § 488),[4] *aff'd*, 984 F.2d 530 (1st Cir. 1993) ("*Finnern II*"). Section 488 precludes liability for skiing injuries except those caused by negligent operation or maintenance of a ski area. "[T]he statute also emphasizes that skiers assume a significant amount of risk in engaging in the inherently risky sport of skiing." *Finnern II*, 984 F.2d at 534.

[4] Section 488 reads in relevant part as follows:

> It is hereby recognized that skiing as a recreational sport . . . may be hazardous to skiers or passengers, regardless of all feasible safety measures which can be taken. Therefore, each skier shall have the sole responsibility for knowing the range of his own ability to negotiate any slope or ski trail, and it shall be the duty of each skier to conduct himself within the limits of his own ability, to maintain control of his speed and course at all times while skiing, to heed all posted warnings and to refrain from acting in a manner which may cause or contribute to the injury of himself or others. Except as otherwise specifically provided in this subchapter, *each skier who participates in the sport of skiing shall be deemed to have assumed the risk of the dangers inherent in the sport and assumed the legal responsibility for any injury to his person or property arising out of his participation in the sport of skiing, unless the injury or death was actually caused by the negligent operation or maintenance of the ski area* by the ski area operator, its agents or employees. Except as provided in this section, the responsibility for collisions by any skier while actually skiing, with any person or object, shall be solely that of the skier or skiers involved in collision and not that of the ski area operator. . . .

26 M.R.S.A. § 488 (emphasis added) (omitting portions concerning tramways).

A. Maintenance and Grooming of the 3-D Trail

The plaintiff styles its claim as one for negligent maintenance by alleging that the defendant "maintained and groomed the trail in such a way as to create the mogul field where it was not sufficiently visible to skiers . . . ." Complaint ¶ 6. Artful language, however, cannot transform a trail design claim into a maintenance or operation claim. *See Finnern I*, 1991 WL 487442, at *1.

Section 488 precludes claims for negligent trail design and construction because a skier is "expected to take responsibility to determine what slopes his ability will permit him to negotiate successfully and to recognize that their design and construction will encompass a variety of risks, among them steepness and objects to be avoided." *Id.* Thus, decisions affecting the essential character of the trail over which the skier is expected to travel, such as the degree of trail curvature or inclination, or what trees will remain along the periphery, are design decisions. *See Finnern II*, 984 F.2d at 535. Each skier must judge whether a given trail or obstacle is within his or her ability.

In contrast, ski area operation and maintenance do not affect the essential character of the trail. Negligent operation or maintenance claims involve such things as stumps left in the trail, *Sanchez v. Sunday River Skiway Corp.*, 802 F. Supp. 539, 540-41 (D. Me. 1992) ("*Sanchez I*"), machines placed in precarious positions without proper warning, and failure to notify skiers that a trail was closed due to dangerous conditions, *see Finnern II*, 984 F.2d at 535. Such mistakes or omissions do not involve trail elements over which skiers are expected to travel.

The defendant allowed moguls to form on 3-D to provide intermediate-level skiers with a diverse skiing experience. Skiers are clearly expected to travel over moguls, just as they are expected to travel around sharp turns and over steep drops. Unlike the stump in *Sanchez I*, moguls

are, by design, part of the 3-D ski trail. A skier must take responsibility to judge what slopes he or she can ski, being cognizant that trail design and construction encompass a variety of risks, including steepness and "myriad other ordinary properties." *Finnern II*, 984 F.2d at 535. Moguls are among such properties. Accordingly, section 488 bars the plaintiff's claim for negligently creating a mogul filed because it raises issues of trail design, not operation or maintenance.

B. Failure to Warn of the Mogul Field

Failure to warn of a hazard may constitute negligent operation or maintenance under section 448. *Finnern I*, 1991 WL 487442, at *2. Here, the plaintiff claims that the defendant failed to warn him that there was a mogul field hidden on the other side of the breakover. The defendant, however, argues that it has no duty to warn of dangers inherent in the sport of skiing.

This court recently held that a ski area operator had no duty to warn of the danger of falling because that is a danger inherent in skiing. *McGuire v. Sunday River Skiway Corp.*, Civ. No. 93-248-P-H, 1994 WL 505035, at *5 (D. Me. Sept. 2, 1994), *aff'd*, 47 F.3d 1156 (1st Cir. 1995) (table). Yet, this court has also stated that the "negligent operation or maintenance" clause marks an exception to the "assumption of risk" clause. *Sanchez I*, 802 F. Supp. at 540 (dicta); *Finnern I*, 1991 WL 487442, at *1 (dicta). To rule on the defendant's motion, I must decide whether a skier's assumption of risk is limited by the negligent operation or maintenance exception.

1. Interpretation of Section 488

As enacted in 1977 and amended in 1978, the sentence in question read:

> [E]ach skier shall be deemed to have *assumed the risk of and legal responsibility for* any injury . . . arising out of his participation in Alpine or downhill skiing, unless the

> injury . . . was actually caused by the negligent operation or maintenance of the ski area . . . .

P.L. 1978, ch. 608, § 2 (emphasis added). In this form, the negligent operation or maintenance exception applied to the skier's assumption of the risk of and legal responsibility for any skiing injury. In 1979 a proposed amendment was introduced that read, in part:

> Each person who participates in the sport of skiing accepts as a matter of law, the dangers inherent in the sport, and to that extent may not maintain an action against the operator for any injuries which result from those inherent risks, dangers or hazards. The categories of such risks, hazards or dangers which the skier or passenger assumes as a matter of law include, but are not limited to, the following whether above or below snow surface: Variations in terrain, surface or subsurface snow or ice conditions, bare spots, rocks, trees, stumps and other forms of forest growth or debris, lift towers and components thereof, pole lines and plainly marked or visible snow making equipment, collisions with other skiers or other persons or with anything listed in the categories included in this paragraph.

L.D. 870 § 1 (109th Legis. 1979). The accompanying Statement of Fact read: "The purpose of this bill is to provide that persons who ski must accept the dangers inherent in that sport . . . . The bill also provides that a person may not bring suit against a ski area operator for injuries resulting from those inherent risks." *Id.*, Statement of Fact. The amendment as adopted read (and reads in the current statute) as follows:

> [E]ach skier . . . shall be deemed to have assumed the risk of the dangers inherent in the sport *and* assumed the legal responsibility for any injury . . . arising out of his participation in the sport of skiing, unless the injury . . . was actually caused by the negligent operation or maintenance of the ski area . . . .[5]

P.L. 1979, ch. 514, § 3 (emphasis added).

Thus, the 1979 amendment separated the risk assumed from the legal responsibility assumed. "It cannot be presumed that the legislature would do a futile thing." N. Singer, *Sutherland Stat. Const.* § 45.12 (5th Ed.). Unless the legislature intended the assumption of the risk to act independently of the negligent operation or maintenance exception, the 1979 amendment was merely an empty exercise.[6] This interpretation is consistent with the purpose behind the amendment as originally drafted: to prevent suits for injuries arising from the inherent dangers of skiing. *See* L.D. 870, § 1, Statement of Fact.

This interpretation comports with our prior decisions. In *McGuire*, 1994 WL 505035, at *5, this court granted summary judgment against the plaintiff on her negligent-failure-to-warn claim because the defendant had no duty to warn of the inherent danger of falling while skiing. And in *Sanchez I*, where this court initially held that a ski area's failure to clear a stump from the trail raised

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[5] The only clue concerning why the bill was amended is found in a statement by Representative Gwadosky which is contained in the legislative record. Representative Gwadosky indicated that he opposed the list of specific examples of inherent dangers contained in the bill because, in his view, it "was a very dangerous precedent for us to be allowing certain exemptions [from ski area operator responsibility], such as rocks, bare spots, stumps and trees." 2 Legis. Rec. 1801 (1st Reg. Sess. 1979) (statement of Rep. Gwadosky). With the list deleted, Representative Gwadosky felt the bill was "harmless." *Id.*

[6] Similarly, courts should avoid constructions that render any part of a statute superfluous. *Sutherland Stat. Const.* § 46.06. To read the negligent operation or maintenance exception to apply to both the assumption of risk and the assumption of legal responsibility would render the "assumption of risk" clause a nullity. This is because the subcategory of accidents involving inherent dangers is subsumed within the far larger category of *any* skiing injury.

an issue of negligent operation or maintenance, it subsequently considered whether the stump was a "danger[] inherent in the sport." *Sanchez v. Sunday River Skyway Corp.*, 810 F. Supp. 17, 18 (D. Me. 1993) ("*Sanchez II*"). In both cases the court could not have reached the inherent danger issue unless the assumption of the risk operated independently of the negligent operation or maintenance exception.

To summarize, under the statutory provision in question, skiers (1) absolutely assume the risk of dangers inherent in the sport and are therefore responsible for injuries resulting therefrom, and (2) assume as well legal responsibility for all other types of skiing injuries except those caused by negligent operation or maintenance. 26 M.R.S.A. § 488. Accordingly, I hold that under section 488 a ski area operator has no duty to warn skiers of dangers inherent in the sport of skiing. *Cf. Lorfano v. Dura Stone Steps, Inc.*, 569 A.2d 195, 197 (Me. 1990) (no duty to warn of obvious or apparent dangers).

2. Duty to Warn of the Mogul Field

The defendant argues that mogul fields in general are an inherent danger of skiing. The plaintiff responds that *this* mogul field, a "blind, trail-wide mogul field which cannot be negotiated at GS speeds, and which was consciously placed in that location by the ski area," does not constitute an inherent danger. Plaintiff's Objection and Memorandum in Opposition to Defendant's Motion for Summary Judgment (Docket No. 11) ("Plaintiff's Memorandum") at 11. The plaintiff defines the issue too narrowly.

As the plaintiff concedes, "Moguls are an important part of the sport of skiing." *Id.* at 10. The defendant chose to allow a mogul field to form on and become a characteristic of 3-D in order

to provide skiers with a diverse skiing experience and a variety of terrain. Moguls are, like "other skiers on the slopes," *Finnern II*, 984 F.2d at 537, an inherent danger under section 488.[7]

Although section 488 bars claims for negligent trail design, *Finnern I*, 1991 WL 487442, at *1, the plaintiff argues that this mogul field is not an inherent danger because of where on the trail the defendant chose to position it. That design decision is not actionable under section 488. To allow the plaintiff to convert an inherent danger into a non-inherent danger merely because of the defendant's design decision would subvert the purpose of section 488.

Furthermore, section 488 requires skiers to know their own ability to negotiate any slope and to ski within the limits of that ability. As the plaintiff admits, when approaching a breakover followed by a blind spot, a skier should slow down to see what is on the other side and be in a position either to stop or to maneuver around it. Any number of obstacles could lie on the other side, including another skier. That skier, although concealed by the breakover, would still be an inherent danger. *See Finnern II*, 984 F.2d at 537. To "immunize" the plaintiff from an inherent danger merely because he chose to ski blindly over a breakover would contravene the statutory requirement that skiers ski responsibly and in control.

In some cases, determining whether a hazard is an inherent danger under section 488 may be inappropriate for summary judgment. *See Sanchez II*, 810 F. Supp. at 18-19.[8] In others, however,

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[7] The plaintiff makes a misguided argument that, because the defendant could have eliminated or moved the mogul field from its location on the trail, "[t]here was nothing natural, inseparable or necessary about it." Plaintiff's Memorandum at 9 (citing definition of "inherent" in Webster's New Universal Unabridged Dictionary (2d ed. 1983)). The statute, however, refers to dangers inherent in the sport, not dangers inherent in a particular trail.

[8] In *Sanchez II* this court reserved for the jury the issue of whether a tree stump in the trail constituted an inherent danger. A tree stump is a foreign object that skiers may not expect to (continued...)

the issue may be decided as a matter of law. *See McGuire*, 1994 WL 505035, at *5 ("The possibility that a skier will fall and get hurt on a ski slope is a danger 'inherent in the sport' of skiing."); *see also Finnern II*, 984 F.2d at 537 ("As Maine law dictates, other skiers on the slopes of the state's ski areas are an inherent risk assumed by skiers."). The reason mogul fields are allowed to form and remain is so that skiers can ski on them. I conclude that no rational jury could find that moguls are not a danger inherent in the sport of skiing. The defendant, therefore, had no duty to warn the plaintiff of the mogul field.

IV. Conclusion

For the foregoing reasons, the defendant's motion for summary judgment is **GRANTED**.

Dated at Portland, Maine this 8th day of November, 1995.

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David M. Cohen
United States Magistrate Judge

[8] (...continued)
encounter on the trail. In contrast, the purpose of mogul fields is for skiers to ski on them.